No. 274.

Brief of Atty. Gen. (Trust) for Appt.

Filed Oct. 19, 1897.

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JAMES H. McKENNEY,
CLERK

In the Supreme Court of the United States.

October Term, 1897.

THE UNITED STATES, APPELLANT,
v.
CHARLES A. CARTER, APPELLEE.
No. 274.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF OF APPELLANT.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES, APPELLANT, v. CHARLES A. GARTER, APPELLEE. } No. 274.

BRIEF OF APPELLANT.

STATEMENT OF CASE.

The facts of this case as found by the court below are briefly as follows:

Appellee was from November 6, 1890, to December 13, 1894, United States district attorney for the northern district of California. While such district attorney he was directed by the Attorney-General to appear for and represent *The United States, appellants,* v. *Munson Curtis Hillyer et al., appellees,* on an appeal taken by the United States to the circuit court of appeals for the ninth circuit from a judgment rendered by the district court for the district of Alaska, and in pursuance of said direction appellee prepared and argued said case before said court

of appeals sitting at San Francisco, within the territorial lines of the northern district of California.

Appellee presented his duly certified account for these services for the sum of $450, which was allowed by the Attorney-General in the sum of $300 and sent to the Comptroller of the Treasury, who referred it to the Court of Claims, under the provisions of section 1063, Revised Statutes.

ASSIGNMENT OF ERRORS.

I.

The court erred in finding that, while district attorney for the United States for the northern district of California, the said appellee, Charles A. Garter, was employed by the Attorney-General as special counsel for the United States in the Case of *The United States, appellants,* v. *Munson Curtis Hillyer et al., appellees,* as set forth in Finding II.

II.

The court erred in finding as a conclusion of law that said appellee recover from these appellants the sum of $300 for his services rendered in said case, which should not be included in any emolument account theretofore earned by appellee as a district attorney.

III.

The court erred in rendering judgment in favor of said appellee and against these appellants for said sum, which should not be included in any emolument account as aforesaid.

ARGUMENT.

The difficulty in this case arises from the act of March 3, 1891 (26 Stat. L., 826), creating the circuit courts of appeals. This act provides clerks and marshals for said courts, but is silent upon the subject of law officers for the United States therein.

The court can not, we think, entertain the presumption that it was the intention of the act to leave the Government without law officers in these courts, and should look to preceding legislation for a solution of the difficulty. We shall therefore contend that it is the duty of the district attorney for the district in which the court of appeals shall be sitting (as in this case) to appear for the United States in all cases in which they may be directly or indirectly interested, whether the fee bill in force at the time this service was performed provided a compensating fee therefor or not.

Section 771, Revised Statutes, is as follows:

> It shall be the duty of every district attorney to prosecute in his district * * * all civil actions in which the United States are concerned.

It will be observed that this section does not refer to any particular court, but is broad enough to cover all the courts in his district, State or Federal. It can not be contended that there was no fee provided for such services as these, and it was not therefore the duty of the district attorney to perform them. The *duties* of a district attorney are one thing and his *compensation* quite another thing. Of course, the fee bill was drawn so as to make the fees relate in some measure to the duties

performed, but it by no means follows that an injunction to perform a duty was void unless accompanied by provision for a compensating fee.

Section 355, Revised Statutes, provides that district attorneys shall perform certain duties in relation to the titles of the public property within their respective districts, but the fee bill had no provision which, by the most liberal construction, allowed them any compensating fee. It was for compensation for services for which no fee was provided that salaries were allowed these officers.

It therefore seems plain that it was the duty of this district attorney to perform these services whether there was a compensating fee provided for them or not, and that a neglect to perform them would have been a gross breach of official duty. If it was his duty, it seems to us that it inevitably follows that he must look to the statutes and not to the discretion of the Attorney-General for his compensation.

Whether he was entitled to any fee in this case under the statutes is not clear. We do not think he could claim assimilated fees under section 299, Revised Statutes, because in this case the United States was a party of record, and that section expressly provides for cases where the United States is not a party of record. We do not think he could by analogy charge the fee allowed by section 824, Revised Statutes, for appeals from the district to the circuit court, because these are specific fees for specific acts. There is no room for analogy. Before the fee is earned the act described in the statute must be shown to have been performed. An appeal from the district court

to the circuit court can not by any reasonable construction be held to be the same thing as an appeal from the district court to the circuit court of appeals.

These services seem to conform in every respect, so far as mere words are concerned, to those for which a fee of $10 was provided, and which are described in section 824, Revised Statutes, in these words:

> In cases at law when judgment is rendered without a jury.

The only objection, so far as we can see, to holding that the services in this case fall within this provision is that the age of the statute and the reference to a jury show that Congress could not have had the circuit court of appeals in actual contemplation when the fee was fixed. But is this an objection to the construction? Congress did not have in contemplation at the time the fee bill was fixed, the attorney for many of the districts, for it was enacted before many of them were formed, nor did it have in contemplation many of the laws of which they were to secure the execution, but it can not be held that these were not subject to or provided for by the fee bill.

Or, if this be not correct, he earned whatever fee would have been taxed in the Supreme Court under that clause of the second section of the act of March 3, 1891, which says:

> The costs and fees of the Supreme Court now provided for by law shall be the costs and fees in the circuit courts of appeals.

It seems clear, then, that this service, being performed in his own district, was a part of the duty of this district attorney. It certainly was not the duty of the attorney of any other district, even though the case was appealed from his district.

If it was the duty of the Attorney-General and his various assistants, then under what statute was this district attorney employed? Certainly not under Revised Statutes, section 363, which authorizes the Attorney-General to employ and retain such attorneys and counselors at law as he may think necessary *to assist the district attorneys* in the discharge of their duties, since the case occurred in his own district and he could not be employed to assist himself; nor was he retained under section 366, since he received from the head of the Department of Justice no commission as a special assistant to the Attorney-General or to some of the district attorneys, as therein required; nor under section 367, because he was not sent out of his State or district, as may be contemplated by that section, and was not an officer of the Department of Justice.

And, further, section 365, Revised Statutes, prohibits the payment of compensation for special legal services unless the Attorney-General certifies that the service could not be performed by the Attorney-General, Solicitor-General, or the officers of the Department of Justice, or by the district attorneys.

That certificate the Attorney-General did not make in this case, and could not make, because the services were in fact performed by the district attorney, and that, too, within his own district.

In *United States* v. *Smith* (158 U. S. R., 346), when Smith, a district attorney in New Mexico, was ordered by the Attorney-General to appear for the United States in certain cases in the Territorial courts in his district in which the United States was interested and for which he claimed compensation other than fees, this court says (p. 355):

> It is true there is a provision in section 363 that the Attorney-General shall, whenever the public interest requires it, employ and retain, in the name of the United States, such attorneys and counselors at law as he may think necessary to assist the district attorneys in the discharge of their duties, and shall stipulate with such assistants, attorneys, and counsel the amount of compensation, but this evidently does not contemplate that the district attorney himself shall be so employed.

We think there would be no difficulty in reaching the conclusion that it is the duty of a district attorney to perform every character of legal service which the interests of the Government may require in his district, and that when he was not compensated for it by a statutory fee he was by his salary, but for one statute which recognizes compensation other than fees and salary.

In the appropriation bill for the fiscal year ending June 30, 1889, (25 Stat. L., 542), was an appropriation of $85,000 "for payment of district attorneys, the same being for payment of such special compensation for services not covered by the salary or fees." This appropriation has been repeated each year since. Up to the making of this appropriation there was absolutely no provision for extra

compensation of district attorneys, and they were supposed to be fully compensated by their salaries and fees.

From the foundation of the Government the law officers of the United States have been the Attorney-General and his various assistants and the district attorneys and their assistants. For a hundred years it was the duty of one of these officers to perform every service of a legal character which was necessary to protect the interests of the United States. This must be true, because we can not suppose that the Government allowed any of its interests to go unprotected for so long a time. If the service was the duty of the district attorney, he was compensated for it by his salary and fees; if it was not his duty, it was the duty of some other law officer of the Government, who was paid to perform it, and the district attorney could not be lawfully employed upon it. (Sec. 365, Rev. Stat.)

It may be insisted, however, that to hold that every necessary legal service in his district is the duty of a district attorney, and that he is compensated by his salary and fees, would be to hold that the appropriation act had no effect whatever, and that it is the duty of the court to give it some effect if possible. We consider that the court should adopt a construction which will give the act some effect, if it can, and we do not think it positively follows that the construction we have suggested renders the act without effect. A district attorney may render valuable services to the Government which are not strictly of a legal character, or he may, under some circumstances, render services outside of his district

which would be "services not covered by the salary or fees."

But whatever construction the court may give the appropriation act, we do not think it should hold that the appearance of a district attorney, in a case to which the United States is a party, in a court in his own district, is anything but his simple duty or that the statute failed to provide compensation for it.

Whatever Congress meant by that appropriation act, the smallness of the appropriation negatives the idea that it could have intended to compensate for this character of service, nor could the circuit court of appeals have been in actual contemplation, for this appropriation was first made October 2, 1888 (25 Stat. L., 505), and the act establishing the circuit court of appeals was not passed till March 3, 1891 (1 Supp. R. S., p. 909).

LOUIS A. PRADT,
Assistant Attorney-General.

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